

What's New December 2008

Cases

Australia

[Wurridjal & Ors v Commonwealth of Australia & Anor \[2008\] HCATrans 348](#)

[Wurridjal & Ors v Commonwealth of Australia & Anor \[2008\] HCATrans 349](#)

Judgment was reserved concerning the issue of acquisition of property other than on just terms. The land concerned was Aboriginal land which was subject to a five year lease to the Commonwealth. The issue was whether ss 31, 32, 34, 35, 36, 37, 50, 51, 52, 60, 61, 62, 68(2) and 134 of *Northern Territory National Emergency Response Act 2007* (Cth) ("the Emergency Response Act") and items 12, 15 and 18 to Sch 4 of *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) ("impugned provisions") affect acquisition of property subject to s 51 (xxxix) *Constitution*. The Court looked to whether the property was acquired other than on just terms and was therefore invalid. An additional issue considered was whether payment of reasonable compensation is just terms.

[Collard v The State of Western Australia \[2008\] FCA 1566](#)

[Sambo v State of Western Australia \[2008\] FCA 1575](#)

Application to have members of an applicant in a native title determination claim removed for failure to cooperate with other members of the applicant. The issue was whether a member of an applicant can be removed as a party by reference to O 6 r 9 of the *Federal Court Rules* or whether s 66B of the *Native Title Act 1993* (Cth) should be relied upon. Siopis J dismissed the application based on s 66B(1) of the *Native Title Act 1993* (Cth).

[Taylor v State of Western Australia \[2008\] FCA 1675](#)

[Phillips v State of Western Australia \[2008\] FCA 1676](#)

[Martin v State of Western Australia \[2008\] FCA 1677](#)

[Whalebone v State of Western Australia \[2008\] FCA 1678](#)

The issue concerned the Court's discretionary power to dismiss an application on its own motion if the application has not been amended since earlier failure of registration test, and no evidence existed that it was likely to be amended in a way that would lead to a different outcome. McKerracher J held that there was no other reason why the application should not be dismissed.

[Lardil, Yangkaal, Gangalidda & Kaiadilt Peoples v State of Queensland \[2008\] FCA 1855](#)

Determination of native title by consent. The issue was whether it is within the power of the Court and appropriate to make an order under section 87 of the *Native Title Act*, and whether section 225 of the *Native Title Act* satisfied. The determination of native title made.

[Anderson on behalf of Numbahjing Clan within the Bundjalung Nation v Director-General of the Department of Environment and Climate Change & Anor \[2008\] NSWLEC 299](#)

Costs proceedings brought in the public interest. Applicant was unsuccessful. The Court held that there was an insufficient basis for departing from the usual order that costs follow the event.

[Evans on behalf of the Koara People v The State of Western Australia \[2008\] FCA 1557](#)

Notice on Court's own motion to show cause why an application should not be dismissed pursuant to s 190F(6) of the *Native Title Act* (Cth). The application was not likely to be amended

in a way that would lead to a different outcome once considered by the Registrar of the Native Title Tribunal and there was no other reason why the application should not be dismissed. The application was dismissed.

International

Frontenac Ventures Corporation v. Ardoch Algonquin First Nation, Robert Lovelace, Paula Sherman and Her Majesty the Queen in Right of Ontario - and - Native Women's Association of Canada (Ont.) (Civil) (By Leave) Coram : [Binnie, Deschamps and Abella JJ.](#)

Application for leave concerning the question whether it is possible for a party who has been found in contempt on the basis of a wilful and deliberate breach of a court order to mitigate the sanction for such contempt by collaterally attacking the order that he or she deliberately breached? Do political protest motives justify the deliberate obstruction of private property and public rights of way, and should such motives be taken into account in mitigation of sentences imposed as a result of the breach of court orders? Did the Court of Appeal's application of the principles in *R. v. Gladue*, [1999] 1 S.C.R. 688, effectively overrule jurisprudence to the effect that aboriginal rights exist within the Canadian legal system and not outside of it? The application for leave to appeal was dismissed with costs to the respondents.

Musqueam Indian Band v. Minister of Public Works and Government Services and Squamish Nation AND BETWEEN Squamish Nation v. Minister of Public Works and Government Services (F.C.) (Civil) (By Leave) Coram : [McLachlin C.J.](#) and [Fish and Rothstein JJ.](#)

This was an application for an interlocutory injunction regarding the Federal government selling small parcel of urban-developed land located within First Nation's traditional territory. One issue was what were the interests of the First Nation that are to be considered in the analysis of irreparable harm? Are they economic interests or are they to be consulted and, if appropriate, accommodated by the Crown with respect to the Crown's proposed action? Does the right to be consulted and accommodated only exist to prevent economic harm to Aboriginal title or rights, or does it have a fundamental constitutional dimension as part of the reconciliation between the pre-existence of aboriginal societies and the sovereignty of the Crown? Whether prospective harm would be compensable in damages, and if so, would justify the refusal of an injunction, in a case of a constitutional failure to consult where an award of damages had not been sought, and could only arise after full aboriginal title litigation. The application for an extension of time was granted and the applications for leave to appeal were dismissed with costs to the respondent Minister of Public Works and Government Services.

Legislation

[Aboriginal Land Rights \(Northern Territory\) Amendment Regulations 2008 \(No. 1\) \(Cth\)](#)

"The purpose of the Regulations is to prescribe certain parcels of land on Groote Eylandt (Angurugu and Umbakumba) and Bickerton Island (Milyakburra) totalling approximately 974 hectares as a single township in relation to the Anindilyakwa Land Trust. The Regulations will enable the Anindilyakwa Land Trust to lease the township under section 19A of the Act [*Aboriginal Land Rights (Northern Territory) Act 1976*]" (Explanatory Statement page 1).

Indigenous Land Use Agreements

- See the [National Native Title Tribunal Website: ILUAs](#)
- The [Native Title Research Unit](#) also maintains an [ILUA summary](#) which provides hyperlinks to information on the NNTT and ATNS websites.
- Information about specific ILUAs is also available in the [Agreements, Treaties and Negotiated Settlements \(ATNS\) Database](#).

Native Title Determinations

- See the [National Native Title Tribunal website: Search Determinations](#)
- The [Native Title Research Unit](#) also maintains a [Determinations Summary](#) which provides hyperlinks to determination information on the Austlii, NNTT and ATNS websites.
- The [Agreements, Treaties and Negotiated Settlements \(ATNS\) Database](#) provides information about native title consent determinations and some litigated determinations.

Native Title in the News

- [NTRU Native title in the News](#)

Publications

Venn, T. J. 'Economic implications of inalienable and communal native title: the case of Wik forestry in Australia' *Ecological Economics* (2008) Vol. 64 No. 1 pp. 131-142.

Brennan, S 'Compulsory acquisition of native title land for private use by third parties' *Public Law Review* (2008) Vol. 19 No. 3 pp. 179-185.

Korosy, Z 'Native title, sovereignty and the fragmented recognition of Indigenous law and custom' *Australian Indigenous Law Review* (2008) Vol. 12 No. 1 p. 81-95.

Brennan, S 'Wet or dry, it's Aboriginal land: the Blue Mud Bay decision on the intertidal zone' *Indigenous Law Bulletin* (2008) Vol. 7 Issue 7 pp. 6-9.

Reviews & Reforms

Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs Discussion Paper and Attorney General's Department – [Optimising benefits from Native Title Agreements](#), Canberra 2008.

Speeches, Seminar Papers and Conference Presentations

Neate, G and Catlin, J '[Intervention strategies in native title mediation](#)' Paper delivered to the *9th National Mediation Conference*, Perth, 10 September 2008.

Robert McClelland, ([Speech delivered at the Native Title Consultative Forum](#)), Old Parliament House, Canberra, 4 December 2008.

Training and Professional Development Opportunities

- See the [Aurora Project: Program Calendar](#) for information about [Learning and Development Opportunities](#) for staff of native title representative bodies and native title service providers.
- AIATSIS has announced the [2009 Native Title Conference](#) 'Spirit of Country: Land, Water and Life' to be held in Melbourne from 3-5 June. The Institute has called for expressions of interest for papers and panels.

Events

- [NTRU events calendar](#)

(Sourced from NNTT Judgements and Information email alert service and the Federal Court's Native Title Bulletin)